

Off-Site Contamination – How Does It Affect My Property?

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Contamination of property from hazardous substances can come from two sources – either the contamination comes from sources on the property or it comes from sources “off-site”. For persons who possess or control a property impacted by off-site contamination (e.g., a property owner), Wisconsin state law provides liability exemptions.

The statute, s. 292.13 Wis. Stats., limits the responsibility of the person who possesses or controls the property when soil, sediment, or groundwater contamination migrates onto their property from another property.

The Wisconsin Department of Natural Resources (DNR) provides this off-site exemption, as well as liability clarifications, to those individuals affected by contamination that originated at sources not under their control or possession.

These provisions are important because without them, the state’s Hazardous Substance Spills Law, s. 292.11, Wis. Stats. (also known as the Spill Law), requires those who possess or control a contaminated property to take remedial actions.

With an off-site exemption, however, persons who possess or control property are not responsible for taking any action on contamination that migrates onto their property if they meet certain conditions. In addition, if persons meet those conditions, they can – for a fee – request that the DNR provide them with a letter clarifying that they are exempt from the Spill Law with respect to the substance(s) migrating onto the property.

This exemption encourages redevelopment of these properties, yet continues to require those responsible for the source of contamination to conduct the appropriate actions (e.g., removal of barrels, investigation, cleanup, etc.).

What is “Off-Site” Contamination?

“Off-site” contamination, as described in s. 292.13, Wis. Stats., means one or more hazardous substances that have migrated in groundwater, sediment or soil and are found on a property other than the original contamination source. The term “off-source” is also used to describe this type of contamination.

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Off-Site Exemption Letter – When Should I Request One?

The off-site exemption applies to the discharge of a hazardous substance to the environment from the source property to another property, where the released substance migrates in soil, sediment, surface water or groundwater.

Examples of situations where discharges on source properties may migrate to neighboring properties through soil, sediment, groundwater or surface water include (but are not limited to):

- spills or releases of hazardous substances from industrial practices;
- leaking underground storage tanks;
- discharges of hazardous substances to groundwater at waste disposal sites containing solid or hazardous waste; or
- hazardous substances in sediment that are carried by water to another property (i.e., during a flood, when contaminated sediment is carried by water from another source onto shoreline property).

A person may request DNR staff determine whether he/she qualifies for an off-site exemption to:

- (1) summarize the clean-up liability status, especially for those property owners unfamiliar with Wisconsin state laws;
- (2) provide comfort to property owners or prospective purchasers who seek an off-site exemption or liability clarification in writing from the DNR; and
- (3) establish the adequacy of the site-specific information, in case there is a question about who is responsible for the contamination.

Eligibility Requirements For An Off-Site Exemption

Eligibility for the off-site exemption is limited to persons who possess or control the affected property. A “person,” defined in s. 292.01(13), Wis. Stats., means "an individual, owner,

operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency."

The off-site exemption requires that the person or party meet all of the statutory conditions listed below. If one or more conditions are not met, the DNR can still provide an applicant with a written determination that clarifies liability, but does not provide the exemption. This letter is called a general liability clarification letter.

To receive a written determination under s. 292.13, Wis. Stats., that confirms the off-site liability exemption, the person requesting the exemption must demonstrate the following:

- a discharge from an off-site source is present on the property that the person possesses or controls;
- the person does not possess or control the source property;
- the person did not and does not currently possess or control the hazardous substance on the source property; and
- the person did not cause the original discharge of hazardous substances.

In addition, the person must agree to comply with the following:

- allow reasonable access of the property to the DNR – and any responsible party – for the purpose of conducting environmental response actions;
- not interfere in any actions taken to respond to the discharge;
- avoid actions that worsen a discharge;
- comply with any other site-specific condition the DNR deems necessary to ensure that an adequate response action is taken; and
- take actions to prevent an imminent threat to human health, safety or welfare, or to the environment due to soil contamination, including sediment contamination, when required by the DNR to do so.

“Persons” who meet the statutory criteria listed above, have the off-site liability exemption, regardless of whether they have an off-site letter from the DNR.

Persons who do not satisfy one or more of the criteria necessary for the off-site exemption are eligible for general liability clarification letters from the DNR.

An example is a prospective purchaser who does not yet "possess or control" a property with off-site contamination. In these situations, DNR will provide a site-specific determination of liability based on submitted information and may identify the additional criteria that must be met to qualify for the off-site exemption.

Each situation will vary depending on the site-specific information. Generally, when historical uses and potential releases on the source property are the same as or similar to those on the off-site property, the DNR requires more information to determine if an off-site exemption is warranted.

Once I Have An Off-Site Exemption – What Am I Exempt From?

With respect to hazardous substances migrating onto property from off-site sources, the person who possesses or controls the property and meets the eligibility criteria in s. 292.13, Wis. Stats., is exempt from the following requirements in the Spill Law:

- the responsibility to take necessary response actions (e.g., investigation, cleanup, etc.) to restore the environment to the extent practicable, and minimize the harmful effects of the discharge to the air, land or water;
- the ability of the DNR to order preventive measures if the existing control measures are found to be inadequate to prevent further discharges;
- the requirement to reimburse the DNR for any costs associated with the DNR responding to the contamination on the person's property; and

- actions that could be required if the DNR were to issue an emergency or special order for the protection of public health, safety or welfare.

The person or party who possesses the property impacted by off-site contamination is still required to provide immediate notification to the DNR under ch. NR 706, Wis. Adm. Code, and s. 292.11(2), Wis. Stats., regarding the presence of a discharge of a hazardous substance, even if it originates from a neighboring property.

If the DNR has already been notified about the contamination source, another notification is not necessary.

When Will I Get An Off-Site Exemption Letter And When Will I Get A General Liability Clarification Letter?

The DNR provides written determinations under s. 292.13(2), Wis. Stats., to persons who own, control, lease, or otherwise possess or control property impacted by off-site contamination.

If the applicant does not meet all of the off-site criteria – for example, does not yet “possess or control” the property (e.g., a prospective purchaser) – a general liability clarification letter can be provided. The same fee applies to each letter.

If all the criteria in s. 292.13, Wis. Stats., are met, DNR will issue a written determination of the off-site liability exemption for persons who possess or control affected property.

If the criteria for the exemption are not met, DNR will issue a general liability clarification letter that explains the person's liability, and may describe the remaining conditions under which the off-site liability exemption would be available to the applicant.

A general liability clarification letter, under s. 292.55(1)(d)1., Wis. Stats., can be provided upon request for the following situations:

- for a lessee who does not “control” the property;
- for a prospective purchaser who meets all of the off-site exemption criteria in s. 292.13, Wis. Stats., except ownership of the property;
- for an area-wide request; these requests are made to clarify the liability of numerous property owners whose properties have contamination that has migrated from a single source property, and where each property owner is not requesting or eligible for a property-specific, off-site exemption letter; or
- for a situation where it has not yet been demonstrated that contamination has migrated onto a property, or where any other condition required for an off-site exemption has not been met.

How To Request An Off-Site Exemption Letter or Liability Clarification Letter

An applicant should fill out DNR Form 4400–201 and send it with the necessary information and fee to the appropriate DNR regional office (see pp. 9-10 for additional information). The DNR will determine whether the applicant is eligible for the off-site exemption letter or the general liability clarification letter.

The determinations are based on site-specific information. If the applicant is not eligible for the off-site exemption letter, a general liability



clarification letter will be issued that may include the conditions under which the exemption would be available to the applicant.

To view the fee schedule or current fee information, please check the DNR’s Remediation and Redevelopment (RR) web site at http://dnr.wi.gov/org/aw/rr/Services_Fees/index.htm. The fees are also listed in ch. NR 749, Wis. Adm. Code.

What Information Do I Need To Submit For An Off-Site Exemption Letter?

In general, the person requesting the letter must submit information that the DNR determines is adequate to substantiate the following:

- contamination exists in soil, sediment or groundwater on the applicant’s property;
- contamination has migrated to the applicant's property from a neighboring property;
- the applicant did not cause and does not possess or control the discharge on the source property; and
- the applicant does not possess or control the source property.

Other information the DNR may request includes the type and volume of hazardous substances handled, generated, or stored on the applicant's property during the period of ownership and/or length of the lease.

This information may be contained in environmental assessments conducted on the property, or from environmental site assessments or site investigations conducted on neighboring properties.

Is a Phase I and II Environmental Site Assessment (ESA) adequate to demonstrate that the contamination is migrating from off-site?

In most cases, standard Phase I and II environmental site assessments (ESAs) will not be adequate to demonstrate that contamination is migrating onto the property from an off-site source. An ESA may document the presence of hazardous substances on a property, but usually

has insufficient information to exclude the property as the source of the contamination.

Generally, the amount of necessary sampling information will be greater when historical uses and potential releases on the source property are the same, or similar to, those on the off-site property.

In these instances, the type of assessment needed to obtain a written off-site exemption from the DNR will be broader in scope than a standard Phase II ESA. The assessment will need to be more in line with the type of sampling that describes the degree and extent of contamination and determines a contamination source, performed in accordance with site investigation requirements under ch. NR 716, Wis. Adm. Code.

If reports regarding the source discharge are available, that will help demonstrate that the contamination is migrating from off-site.

Does the DNR have the authority to ask for more information prior to making an off-site determination?

Yes. The person who requests the off-site exemption is required to provide the DNR with sufficient information to make the determination. If the initial information is inadequate, DNR staff will request additional data.

For example, staff may ask the applicant to provide information on the source of contamination or the lack of a source on the property in question. If sufficient information is not received, DNR may indicate to the applicant that it cannot issue an off-site letter. **Lack of adequate information is the most frequent reason for DNR's denial of an off-site exemption.**

Must the source of the contamination be confirmed prior to receiving the exemption letter?

In most cases, the person seeking the exemption letter does not need to identify the exact location of the source of the off-site contamination.

However, to meet the requirement, the applicant must establish that the source is **not** located on the affected property for which the off-site liability exemption is being requested.

In certain cases, the applicant may also need to establish that the source of contamination is not located on any other property that the applicant previously possessed or controlled, or currently possesses or controls. In other words, the applicant is not eligible if they are responsible for the source of contamination.

Is the fact that the neighboring property is contaminated meet all the conditions I need to receive an off-site exemption letter from DNR?

No, by itself, the presence of nearby contamination does not establish that all the conditions for the off-site exemption have been met.

There needs to be enough information to demonstrate that there has been migration of the hazardous substances onto a property before DNR can make a determination. Other site-specific information, as previously listed, is also needed.

Generally, DNR's determination will require that sampling has been done on a property to confirm that a hazardous substance is actually present on the off-site property.

The results of such sampling are often found in either a site assessment or site investigation report done for the release from the source property. Site investigations typically establish which properties have been impacted by the contamination.

In certain cases, sampling on the property for which the off-site exemption letter is requested may not be necessary if sample results from neighboring properties clearly imply that contamination has migrated onto the property in question.

If the off-site property is not yet affected by contamination, or it has not been demonstrated that contamination from the neighboring

property is impacting a property, a person is not eligible for the off-site exemption letter. However, a liability clarification letter may be issued in some cases.

How can an applicant determine if the available technical information is adequate for the off-site exemption letter?

An applicant should review all the information available pertaining to the affected property and the source property. If they are unsure of what the information means, they may want to hire a competent environmental professional to review the information prior to filling out the application, as well as collect any additional data if necessary.

After the application and fee are submitted, the DNR will review and issue a written determination. If the information provided is inadequate, the DNR will request additional information.

If there is area-wide contamination, and a party requests a liability clarification for multiple properties, but not specifically for a property the party owns, what kind of information should the party submit with the request?

An applicant who is requesting a liability clarification letter in the case of area-wide contamination should submit any available information on the cause of the contamination and any investigation and clean-up activities undertaken.

Most of this information may be available in existing reports in DNR files related to the source property. This information may be in the form of a site investigation report, remedial action plan, or closure request.

The request should also include any available maps of the area that illustrate known environmental impacts to the properties in question. The DNR may then be able to provide a letter explaining the general environmental liability of the owners of properties affected by area-wide contamination. The DNR may also provide an off-site exemption letter upon request

from individual property owners in this type of situation.

What is the GIS Registry of Closed Remediation Sites and how is it related to the off-site liability exemption? If my property is listed on the GIS Registry, is this enough for me to receive an off-site determination from the DNR?

In Wisconsin, state regulations allow for some properties to be considered “closed” – i.e. when the DNR determines that all appropriate investigation and cleanup have been performed to state standards – when there is still residual soil or groundwater contamination existing on the properties.

This situation occurs when natural attenuation is used as the clean-up remedy. Natural attenuation is the use of natural processes in soil and groundwater to contain the spread and reduce the amount of contamination.

The DNR has a Geographic Information System (GIS) Registry of Closed Remediation Sites, which is a database of properties that have been closed with residual soil or groundwater contamination. Properties with off-site contamination are also included on this GIS Registry.

Following the cleanup, property owners with off-site contamination on their properties are notified regarding inclusion on the GIS Registry before a case is closed.

The off-site liability exemption is related to the GIS Registry in that properties whose owners receive these notification letters are affected by contamination from the reported source. However, simply receiving a copy of this notification letter is not adequate information by itself to substantiate that the off-site exemption criteria, under s. 292.13, Wis. Stats., are met. More specific information is needed.

For more information on the GIS Registry and for maps and other site-specific information, please see <http://dnr.wi.gov/org/aw/rr/gis/index.htm>.

Responsible Party Requirements

Who is a “Responsible Party” (RP)?

A “responsible party” (RP) is the person who caused the release of the hazardous substance, or who possesses or controls (i.e., owns) the hazardous substance discharge.

What if there is contamination present from on-site as well as off-site sources?

All property owners are responsible for taking appropriate response actions for any hazardous substance discharges on their property.

However, for hazardous substances that migrate onto and affect a second property from a source property, cleanup is the responsibility of the owner of the source property or the person who caused the release of the hazardous substance.

The property owner affected by off-site contamination would not be responsible for any additional investigation and clean up of any hazardous substances migrating onto the property – assuming the off-site hazardous substances can be distinguished from hazardous substances released from an on-site source, and assuming the property owner meets the requirements of s. 292.13, Wis. Stats.

If the same type of contamination is found on the neighboring property and the property for which the off-site exemption is requested, sufficient information needs to be presented to convince the DNR that the source is actually

located off the property. A discussion with DNR technical staff is recommended for these sites.

Difficult cases include those where several adjacent properties have had similar past land uses, such as properties with underground storage tanks (USTs), industrial operations, or historic fill sites.

If contamination is detected on one property, it can be difficult to determine exactly where the source of the contamination is located.

What if soil, sediment and/or groundwater impacted by off-site contamination needs to be managed on or off the property?

The person managing, excavating, or building on the contaminated soil, sediment or groundwater would be required to follow all applicable local, state and federal laws regarding the management, placement and disposal of those materials. The off-site liability exemption does not waive those requirements.

What can the responsible party do if an adjacent property owner refuses to give access to allow sampling or cleanup to occur?

A responsible party who has been denied access to respond to the discharge of hazardous substances should document the attempts to gain access. This information and a copy of an access agreement the RP attempted to use to get access to the property – that shows the proposed reasonable terms – should be sent to the DNR.

The DNR will evaluate the attempts to gain access and contact the property owner who has refused reasonable access in an effort to facilitate the clean-up process. The DNR may revoke a person’s off-site liability exemption if the person denies access to an RP who wants to respond to the discharge. The DNR could then require that person to respond to the discharge.

As a last resort, the DNR can exercise its inspection authority to gain access in order to respond to the contamination (please see the following section for more information).



Off-Site Property Owner Responsibilities

What are my rights and responsibilities if my property is impacted by off-site contamination?

If you detect contamination on your property, you must provide immediate notification to the DNR under ch. NR 706, Wis. Adm. Code, and s. 292.11(2), Wis. Stats. The discharge of a hazardous substance must be reported to the state even if it is likely to have originated on a neighboring property.

You are still responsible for allowing reasonable access to the responsible party and to the DNR to conduct environmental response actions. If you fail to allow access, you may be held responsible for completing necessary response actions.

You have the right to see the data collected from your property. If you have trouble obtaining this data from the responsible party, you may contact the DNR to obtain the data. You also have the right to negotiate a private agreement with the responsible party for restoration to your property for damage resulting from remediation work. The DNR is not a party to these private agreements.

You can negotiate the removal of contaminants from your property as part of the responsible party's clean-up action.

However, DNR cannot compel a responsible party to conduct a cleanup beyond that which meets state requirements, which in some cases allows for residual groundwater and soil contamination.

When would the DNR require the off-site property owner to take actions to prevent an imminent threat due to soil or sediment contamination?

In some cases, the DNR may require that the person in possession or control of soil or sediment contamination from an off-site source take some limited actions, as outlined in s. 292.13(1m) (e), Wis. Stats.

Generally, the DNR will require that the person who caused the discharge or who possesses or controls the source of the discharge to conduct any necessary emergency actions.

Where that party or parties are not willing or able to do so, the DNR may hire an environmental firm to take the necessary emergency actions if it is a high priority site and if state funds are available to pay for the emergency actions.

However, the DNR also has the authority to require the person whose property is impacted by off-site discharges in the soil or sediment to take necessary actions to prevent an imminent threat to humans or the environment. What constitutes an "imminent" threat will be determined on a case-by-case basis, as outlined in ch. NR 708, Wis. Adm. Code.

Actions may include limiting public access to the property; identifying, monitoring and mitigating fire, explosion and vapor hazards on the property; and visually inspecting the property and installing appropriate barriers.

What if the person who receives the off-site exemption refuses to allow access to the impacted property?

The DNR may assist with resolving disputes between the affected property owner and the party seeking access. A person who refuses access to the responsible party or the DNR for the purpose of conducting environmental response actions has failed to meet an eligibility requirement for the off-site liability exemption.

Ultimately, if access is not granted, the exemption could be revoked. In addition, the DNR may determine that the person who refuses access is exercising possession or control of the contamination migrating onto his or her property, and could therefore be required to take any necessary response actions.

Purchase, Easement or Lease of Source Property or Property with Off-Site Contamination

What happens if a person with the off-site exemption purchases or leases the source property?

If the person with the off-site exemption takes possession or control of the source property where the off-site contamination originated, the off-site exemption would no longer be in effect for that person.

This individual, along with any other person who is responsible for the contamination, would then be responsible for investigating and cleaning up the contamination from the source property, in accordance with the Spill Law.

If the person with the off-site exemption leases or has an easement for the source property, the terms of the lease or easement would determine whether or not the lessee actually controlled the hazardous substance on the source property.

If the affected property is being leased, who should receive the off-site letter?

The answer to this question depends on who requested the letter and presented the supporting information to the DNR. The property owner could request an off-site letter for property that is leased, and could receive the off-site letter.

The lessee could request an off-site letter when, by virtue of a lease agreement, the lessee is exercising possession or control over the hazardous substance discharge or restricting access to the property.

It is the DNR's preference that the property owner and lessee request an off-site letter simultaneously in order to ensure a coordinated response to all parties, especially concerning future access to the property.

Each person should submit a separate application and fee for an off-site exemption letter. Applicants who lease or plan to lease a property affected by an off-site discharge should include a copy of the lease agreement that

For More Information or To Obtain an Application Form

An application (form 4400-201) can be printed off the DNR's web site at <http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-201.pdf>.

relates to the control or release of hazardous substances with their application.

Is the off-site exemption or DNR letter transferable to the next property owner?

No, the off-site exemption and letter are not transferable between parties, such as between the buyer and seller of a property.

However, if the new owner meets the statutory criteria, they would qualify for the off-site liability exemption. A new written determination from DNR would require information to show that the new owner did not cause the release of the contamination or possess or control the source property.

Subsequent owners who would like an off-site exemption letter will need to request a letter and pay the fee to the DNR, and will need to provide the information necessary for the DNR to issue an off-site exemption letter.

Department of Natural Resources Land Recycling Team

For assistance with any information about off-site exemptions or liability clarifications, please contact the RR staff member in your area.

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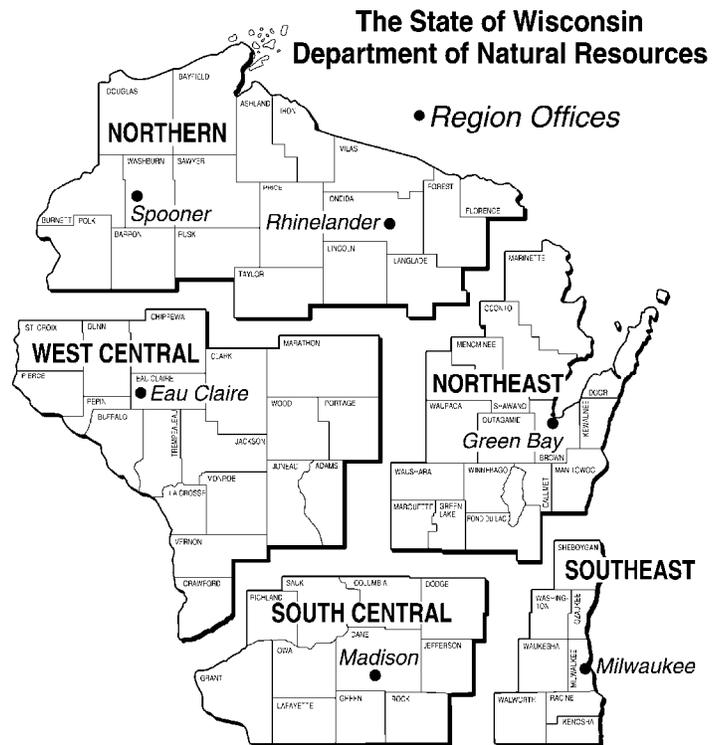
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